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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 166

WILLIAM F. WOLFF, SR.,
Petitioner,
v.
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, petitioner in the above captioned cause respectfully requests the Court to reconsider its Order of November 11, 1965, denying the Petition for Writ of Certiorari and to grant a rehearing on the

question as stated hereinafter, which question had previously been raised in separate parts by petitioner in his previous Petition for Certiorari but for clarity is repeated.

WAS PETITIONER DENIED DUE PROCESS OF LAW BY THE JURY CONSIDERING HIS EXTRA-JUDICIAL STATEMENT ADMITTING AN ALLEGEDLY ILLEGAL PAYMENT TO HIS CO-DEFENDANT BUT CLAIMING A STATUTORY EXEMPTION, AT A JOINT TRIAL WHEN THE CO-DEFENDANT RECIPIENT, DENIED ANY AGREEMENT OR PAYMENT?

The Statute[1] concerning an illegal pay-off between a management official and a union official makes it quite clear that there must be two persons involved in order to commit a crime. There is no crime unless petitioner Wolff paid money to a prohibited individual.

The Trial Court at a very early stage of the trial characterized the crime as being a "joint enterprise in crime" (443a). The Statute also makes it a crime to *agree* to

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[1] Sec. 186—Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

"(a) It shall be unlawful for any employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . . (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . ." 29 U.S.C. Sec. 186. (The statute as noted above was applicable during the period covered by these indictments. It has since been amended. See Title 29 U.S.C.A. Sec. 186, 1964 Cumulative Annual Pocket Part.)

make any payments as therein described. The indictment was a joint one against both defendants.[2] The government's case consisted of a prepondarum of testimony and witnesses who were questioned concerning an alleged agreement existing between the co-defendants.[3] The extra-judicial statement of petitioner Wolff, as introduced by FBI Agent Gylfe, referred in two of the three conferences to an agreement for rental of a tractor between the co-defendants.[4] The Court's instruction emphasized and allowed the jury to find the defendants guilty of agreeing to pay and receive an illegal payment,[5] as well as the crime charged in the indictment.

But most important, the petitioner, Wolff, in his statement to Agent Gylfe raised the defense of an exemption to the criminal statute. In effect, he said he paid money to his co-defendant but that the said co-defendant had provided valuable consideration therefor, to-wit: a tractor at prevailing market rates. The co-defendant, McMaster, denied any such agreement and denied completely any dealing with the petitioner.[6] The jury was, therefore, asked to determine the guilt or innocence of each defendant after having heard a great amount of testimony implicating both defendants in the crime together; after having heard an extra-judicial confession implicating both defendants

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[2] The Sixth Circuit in its decision, in response to Petitioner's question as to vagueness of the indictment as to him, replied that the portion of the indictment relating to McMaster could be used to cure this defect of knowledge. 343 F2d 176, 181.

[3] Of 57 witnesses called by the government, 45 of them testified in refutation of the agreement between Petitioner and the co-defendant.

[4] 105a-112a.

[5] 2025a-2027a.

[6] 1420a-1421a.

together; after having received instructions from the Court that they could find the defendants guilty of agreeing to make and receive such an illegal pay-off; and after hearing the Court characterize the crime as a joint one. The task of giving each individual defendant fair deliberation and consideration as to him alone, became impossible. The collective mind of the jury could not be departmentalized into separate categories so that it could evaluate and deliberate on petitioner Wolff's defense of having made the payment to a prohibited individual but having received valuable consideration therefor without being influenced by the co-defendant McMaster's testimony completely denying the arrangement or his participation in any such transaction or dealing. Even though the Court gave instruction on this point, it is a derogation of petitioner Wolff's constitutional rights to be tried in this manner.[7]

The jury could not have removed the testimony of defendant McMaster from their collective mind in determining the burden of proof of the government as to petitioner Wolff. Is it not possible that any question the jury had as to whether or not the government had sustained its burden of proof as to petitioner Wolff, was resolved by resort to the contradictory testimony of co-defendant McMaster? Conversely, was any uncertainty of the sufficiency of other evidence to prove guilt beyond a reasonable doubt as to co-defendant McMaster, removed by the fact that the

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[7] The testimony of co-defendant McMaster thus pointedly advised the jury of Petitioner Wolff not having taken the witness stand. Thus impliedly admitting the contradictions as urged by co-defendant's testimony. See *DeLuna v. U.S.*, 308 F2d 140 (5th Cir. 1962), *Hayes v. U.S.*, 329 F2d 209 (8th Cir. 1964). As to whether or not such an instruction can cure this prejudice, see *infra*. "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the Trial Judge's duty is to order that the defendant be tried separately". (p. 141).

jury resorted to the evidence of the incriminating extra-judicial statement of petitioner Wolff? When the jury returned its verdict of "guilty" as to both defendants, there was no way of determining whether the jury had in fact convicted each defendant because of the government having established its burden of proving its case beyond a reasonable doubt as against each of them or because any weakness of the government's case was laid to rest by the jury considering the contradictory positions of each defendant.

Jackson v. Denno, 378 U.S. 368, 12 L.ed. 2d, 908 (1964) was a determination by this Court that it was constitutionally impermissible for the same trial jury to resolve both the issue of the guilt or innocence of a defendant as well as the issue of voluntariness of a confession. The majority opinion found that a jury could not have divided its collective mind so as to be able to consider each of these issues apart from each other:

> "If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?
>
> It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its findings of voluntariness, if this is the course it took, was effected by the other evidence showing the confession was true." (388-389, U.S., 922 L.ed. 2d.)

The logic and reasoning of rules as to confession must apply to any incriminating extra-judicial statement made

by a defendant.[8] This Court in *Jackson, supra,* determined that a jury should not be permitted to be influenced by evidence against a defendant that as a matter of law they can not consider but as a matter of fact they can not disregard. The jury in this case could not consider petitioner Wolff's statement incriminating his co-defendant in determining the co-defendant's guilt or innocence, as a matter of law, but as a matter of fact they could not possibly have disregarded the contradictory nature of the statement in considering co-defendant's guilt or innocence. The jury in this case could not have determined the defense of petitioner Wolff that he had received valuable consideration from the co-defendant without considering at the same time, the co-defendant's testimony completely refuting and contradicting this defense.

The jury in the case at bar must, because of the previous factors mentioned, be considered as having rendered a joint verdict, resulting from joint deliberation and joint consideration for both defendants. It, therefore, behooves petitioner Wolff to avail himself of the grave prejudice and errors of law resulting in his co-defendant not receiving a fair trial. The co-defendant can not determine that the jury after listening to the extra-judicial statement of petitioner Wolff effectively ignored the inevitable conclusion that he must have received the money as Wolff stated he gave the money. If the jury is told that A (Wolff) committed certain criminal acts with B (McMaster), then the inevitable conclusion must be that B committed those criminal acts with A. The instruction by the Court to disregard the extra-judicial statement of petitioner Wolff, which incriminated the co-defendant could not have cured

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[8] *Wilson v. U.S.*, 162 U.S. 613 (1896).

the encroachment on the right of the co-defendant to have the jury disregard inadmissible hearsay evidence of any kind.[9]

In *Pointer v. Texas*, 380 U.S. 400, this Court determined that the Sixth Amendment's right "to be confronted with the witnesses against him", including the right to cross-examine these witnesses, was applicable to the states through the Fourteenth Amendment. This Court noted therein that any statements to the contrary as contained in *Stein v. N. Y.*, 346 U.S. 156, 195-196, could no longer be regarded as law. In *Stein*, this Court found that the right of confrontation was not binding on the states and affirmed the conviction of a defendant who had been implicated by the confession of his co-defendants. The confessions had been admitted with the instruction that they were to be considered only against their respective declarants. There is thus cast some constitutional doubt as to whether or not an encroachment upon defendant McMaster's right to confront witnesses and to cross-examine

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[9] Previous jurists have criticized this unfairness to a defendant. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know this to be unmitigated fiction." Mr. Justice Jackson concurring with Mr. Justice Frankfurter and Mr. Justice Murphy in *Krulewitch v. U.S.*, 336 U.S. 440, 453 (1949).

"Undoubtedly the ability to introduce them (declaration of a co-defendant) adds to the inducement to sweep all those concerned into one indictment; and possibly it would have been better, had the price of the admissibility of separate declarations, made after the event been a separate trial of the declarant; for it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition."

Judge Learned Hand, *U.S. v. Delli Paoli*, 229 F2d 319, 321 (1956). Judge Hand also criticized this "mental gymnastics" in *Nash v. U.S.*, 54 F2d 1006, 1007.

them can be justified by having an instruction advise the jury to disregard such evidence.[10]

The crime charged against petitioner Wolff was one of "knowingly" having paid money to an official of a union representing his employees. The only testimony as to what knowledge petitioner Wolff had as to whom the money was going was his statements to Agent Gylfe. Additionally, petitioner Wolff did not deny having made the payments to Ram Transport, Inc. This latter fact coupled with his acknowledgment that Ram Transport, Inc. was owned and operated by co-defendant, McMaster, was a complete recitation and acknowledgment of all facts necessary to find petitioner Wolff, guilty. Of course, he did attempt, through his statement to Agent Gylfe, to place his payments within an exemption under the Statute.[11] But if he does not have an exemption, then he has in essence confessed the crime with which he was charged. No hearing had been had to determine voluntariness of petitioner Wolff's

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[10] *Delli Paoli v. U.S.*, 352 U.S. 232 (1957) affirming 229 F2d 319, stated that extra-judicial statements even though incriminating a co-defendant are admissible with proper instruction. But see, 78 Harv. L. Rev. 211, 213, "Because of these close parallels between *Jackson* and *Delli Paoli*, *Jackson* may foreshadow a holding that the *Delli Paoli* procedure violates due process".

Additionally, "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition, therefore, becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." Mr. Justice Frankfurter, in *Delli Paoli v. U. S.*, *supra*, dissenting opinion, with whom Mr. Justice Black, Mr. Justice Brennan and Mr. Justice Douglas join.

[11] Interestingly, an instruction was first suggested, to limit petitioner's statement to him, by the government counsel (1843a-1853a).

confession of fact to Agent Gylfe.[12] The Fourth Circuit Court of Appeals in *U. S. v. Inman*, decided November 18, 1965 34 LW 2291, determined that on any proffer of a confession, the Court should make a determination of its voluntariness, by having a full hearing and allowing all testimony on this issue, and that this should be done even though no objection had been made by defendant. Then the Court, if it resolves the issue of voluntariness favorable to the government, beyond a reasonable doubt, should make a note of its finding in the record and not disclose it to the jury. The jury should then be given the confession and instructed, whether requested or not, that they must be convinced beyond a reasonable doubt that the confession was given voluntarily.[13]

Petitioner Wolff urges that this Court reconsider and grant his Petition for Re-Hearing as herein prayed so that this Court can determine the rights of defendants in joint trials, where an extra-judicial statement of one defendant incriminates the other and the declarant does not take the witness stand. This issue has been brought to the attention of and decided by a number of State Su-

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[12] The only determination on the question of voluntariness made by the Trial court was in his instruction to the jury in regard to limiting petitioner's statement to him (2030a). "Statements and declarations made by a defendant from which, with other circumstances, an inference of guilt may be drawn, are admissible against him, and him only, as admissions, provided it appears that the said statements were voluntarily made by a defendant".

[13] See also *Hutcherson v. U.S.*, 351 F2d 748 (1965).

preme Courts[14] and by Judge Frank in *U. S. v. Delli Paoli*, 229 F. 2d, 319, 324, dissenting opinion. All of these jurisdictions have resolved this issue by insisting on effective deletion of any incriminating statements or identification of the non-declarant co-defendant or a severance of the defendants; and if these conditions can not be done then the extra-judicial statement should not be allowed into evidence.

There are thus alternate procedures available for a proper disposition of this problem by the trial court.

In the case at bar, the trial court could therefore have merely deleted the mention of the co-defendant's name from the extra-judicial statement of the petitioner and even if this deletion were not sufficient to remove any unfair prejudice to the co-defendant, both defendants would have had no possible prejudice engendered to either of them if the trial court had ordered a severance after being apprised of the contradictory nature of the evidence and defenses.

For the foregoing reasons, petitioner requests the Court to vacate its earlier order denying certiorari and grant certiorari to petitioner on the question herein presented.

Respectfully submitted,

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[14] *Peo. v. Aranda and Martinez*, 34 LW 2261, decided November 12, 1965, California Supreme Court, opinion by Traynor, C. J.

State v. Castelli, 92 Conn. 58, 101 A. 476.

Peo. v. Barbaro, 395 Ill. 264, 69 N.E. 2d 692.

Peo v. Bolton, 339 Ill. 225, 171 N.E. 152.

State v. Rosen, 151 Ohio St. 339, 86 N.E. 2d 24.